Supreme Court, U. S.
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76-411

In The Supreme Court of The United States

TULSA THEATRICAL STAGE EMPLOYEES UNION, LOCAL 354

Petitioner

v.

BROADWAY THEATRE LEAGUE OF TULSA, INC.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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INDEX

Page

Opinions Below 2
Jurisdiction 3
Question Presented 3
Constitutional and Statutory Provisions Involved 6
Statement of the Case 7
Reasons for Granting Writ 14
Conclusion 21

Appendix A - Opinions Below
Opinion of Supreme Court of the State of Oklahoma, of May 18, 1976 23
Order of Court of Appeals of the State of Oklahoma, Division 1, of March 30, 1976 29
Opinion of Court of Appeals of the State of Oklahoma, Division 1, of February 24, 1976 30
Opinion of Court of Appeals of the State of Oklahoma, Division 1, of December 23, 1975 34
Journal Entry of Judgment of the District Court of Tulsa County, State of Oklahoma, of December 11, 1974 37
Order of Supreme Court of the State of Oklahoma, of June 21, 1976 39

Appendix B - Exhibits
Plaintiff's Exhibit 1, written schedule of pay rates and holiday days 40

Appendix C - References to Federal Question and Testimony at Trial
Respondent's request for trial Court to take judicial notice of pertinent Federal and State Statutes 41
Petitioner raising issue of violation of Constitutional rights in argument, to trial Court, on motion for summary judgment 42
Trial Court overruling Petitioner's motion for summary judgment, with exception allowed to Petitioner 42
Petitioner raising issue of violation of Constitutional rights in argument to trial Court, at trial 43
Petitioner raising issue of violation of Constitutional rights in argument to trial Court, on motion for new trial 43

Testimony of Petitioner's intention as to the day intended to be observed as George Washington's Birthday under the contract ... 43

TABLE OF CASES

City of Shreveport v. Cole, 129 U.S. 43, 32 L.Ed 589, 9 S. Ct 210 ... 18
Farrington v. Tennessee, 95 U.S. 679, 24 L.Ed 558 19
Green v. Biddle, 21 U.S. 1, 8 Wheat. 1, 5 L.Ed 547 19
Sturges v. Crowningshield, 17 U.S. 122, 4 Wheat. 122, 4 L.Ed 529 . 20
The Cleveland, Painsville, and Ashtabula Railroad Co v. Pennsylvania, 82 U.S. 300, 15 Wall. 300, 21 L.Ed 179..... 16
Walker v. Whitehead, 83 U.S. 314, 16 Wall. 314, 21 L. Ed 357..... 16
West River Bridge v. Dix, 47 U.S. 507, 6 How. 507, 12 L.Ed 535 ... 19

STATUTES

25 O.S. 1959, Section 82.2 6
15 O.S. 1910, Section 162 6

CONSTITUTIONS

U.S.C.A., Constitution of the United States, Article I, Section 10, Clause 1 6
O.S.A., Constitution, Article 2, Section 15 6

In The Supreme Court of The United States

October Term, 1976

NO._____

TULSA THEATRICAL STAGE EMPLOYEES UNION, LOCAL 354

Petitioner

v.

BROADWAY THEATRE LEAGUE OF TULSA, INC.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Tulsa Theatrical Stage Employees Union, Local 354, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oklahoma, rendered and entered in the above entitled cause on the 18th day of May, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Oklahoma granting certiorari to the Court of Appeals of the State of Oklahoma, Division 1, rendered and entered on the 18th day of May, 1976, is reported at Volume 47, Oklahoma Bar Association Journal 1214, and 550 P.2d 922, and is printed in Appendix A hereto, infra, page 23. The order of the Court of Appeals of the State of Oklahoma, Division 1, amending its opinion of the 24th day of February, 1976, entered on the 30th day of March, 1976, is unreported and is printed in Appendix A hereto, infra, page 29. The opinion of the Court of Appeals of the State of Oklahoma, Division 1, granting Petitioner's motion for rehearing, withdrawing and superseding its opinion of the 23rd day of December, 1975, and reversing the decision of the District Court of Tulsa County, rendered and entered on the 24th day of February, 1976, is unreported and is printed in Appendix A hereto, infra, page 30. The opinion of the Court of Appeals of the State of Oklahoma, Division 1, affirming the decision of the District Court of Tulsa County, rendered and entered on the 23rd day of December, 1975, is unreported and is printed in Appendix A hereto, infra, page 34. The decision of the District Court of Tulsa County, State of Oklahoma, rendered and entered on the 11th day of December, 1974, is printed in Appendix A hereto, infra, page 37.

JURISDICTION

The judgment and decision of the Supreme Court of the State of Oklahoma (Appendix A, infra, page 23) was rendered and entered on the 18th day of May, 1976. A timely petition for rehearing was denied on the 21st day of June, 1976 (Appendix A, infra, page 39). The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C., Section 1257.

QUESTION PRESENTED

On the 2nd day of April, 1971, Sections 82.1 and 82.2 of Title 25 of the State of Oklahoma were amended by the Oklahoma Legislature, effective April 2, 1971, changing the date for the observance of George Washington's Birthday, as a holiday, in the State of Oklahoma, from the date formerly observed, traditionally and by statute, in the State of Oklahoma, to-wit: the 22nd day of February, to the third Monday in February.

The former statute, Section 82.2 of Title 25 of the Statutes of the State of Oklahoma, Laws 1959, which was in effect at the time the parties herein entered into the contract in question, in January, 1969, provided as follows:

> "The following additional days are designated as holidays: Washington's Birthday on the 22nd day of February; Jefferson Day on the 13th day of April; Oklahoma Day on the 22nd day of April; Mother's Day on the second Sunday in May; Indian Day on the first Saturday after the full moon in September; Cherokee

Strip Day on the 16th day of September; Will Rogers Day on the 4th day of November; Citizenship Recognition Day on such date as may be fixed by the Governor; Oklahoma Historical Day on the 10th day of October; Columbus Day on the 12th day of October; Senior Citizen's Day on the 9th day of June; and each day in which a state election is held throughout the State of Oklahoma. Any act authorized, required or permitted to be performed on any holiday as designated in this section may and shall be performed on said day the same as on any business day; provided any state, national or federal reserve bank, building and loan association, credit union, state, federal, county or municipal office may close on any day designated in this section as a holiday, and upon such bank, building and loan association, credit union or public office being closed on such day, any act authorized, required or permitted to be performed at or by such bank, building and loan association, credit union, public office, or public official may be performed on the next succeeding business day and no liability or loss of rights of any kind shall result from such delay." (Laws 1947, p. 235, Section 2; Laws 1959, p. 115, Section 2)

The Supreme Court of the State of Oklahoma, in its decision rendered on the 18th day of May, 1976, reasoned that by virtue of the fact that federal legislation, (specifically applicable to federal employees only and wholly inapplicable herein) had been enacted to become effective January 1, 1971, prior to the date that the parties entered into the contract in question, to-wit: January, 1969, designating the third Monday in February as the date to be observed as the holiday day for celebrating George Washington's Birthday, that it is reasonable to infer that the parties anticipated that state legislation changing the date for the observance of the holiday day, George Washington's Birthday,

in the State of Oklahoma, would follow, even though at the time the parties entered into the contract, the holiday statute in effect in the State of Oklahoma, Section 82.2 of Title 25 of the Statutes of the State of Oklahoma, Laws 1959, specifically designated the date for the observance of George Washington's Birthday, as the 22nd day of February. The question thus presented is: Whether the application by the Court of Section 82.1 of Title 25 of the Statutes of the State of Oklahoma, Laws 1971, to the contract, subsequent to the time when the contract between the parties became effective, impairs the obligation of the contract, unconstitutionally, by changing the date for the observance of one of the designated holiday days, from the date designated by the statute, as it stood before amendment at the time the contract was executed, to another date, thus changing the rate of pay on the original date, constitutes such an impairment of the contractual rights of the parties by judicial and/or legislative action as to violate the provisions of Section 10, Clause 1, of Article I of the Constitution of the United States and Section 15 of Article 2 of the Constitution of the State of Oklahoma.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 10, Clause 1, of Article I of the Constitution of the United States, which provides as follows:

> "No state shall enter into any Treaty, Alliance, or Confederation, grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

This case also involves Section 15, of Article 2 of the Constitution of the State of Oklahoma, which provides as follows:

> "No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed. No conviction shall work a corruption of blood or forfeiture of estate: Provided, that this provision shall not prohibit the imposition of pecuniary penalties."

This case also involves Section 162, of Title 15, of the Statutes of the State of Oklahoma, Laws 1910, which provides as follows:

> "A contract is to be interpreted according to the law and usage of of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."

This case also involves Section 82.2 of Title 25 of the Statutes of the State of Oklahoma, Laws 1959, which provides as follows:

> "The following additional days are designated as holidays: Washington's Birthday on the 22nd day of February; Jefferson Day on the 13th day of April; Oklahoma Day on the 22nd day of April; Mother's Day on the second Sunday in May; Indian Day

> on the first Saturday after the full moon in September; Cherokee Strip Day on the 16th day of September; Will Rogers Day on the 4th day of November: Citizenship Recognition Day on such date as may be fixed by the Governor; Oklahoma Historical Day on the 10th day of October; Columbus Day on the 12th day of October; Senior Citizen's Day on the 9th day of June; and each day in which a state election is held throughout the State of Oklahoma. Any act authorized, required or permitted to be performed on any holiday as designated in this section may and shall be performed on said day the same as on any business day; provided any state, national or federal reserve bank, building and loan association, credit union, state, federal, county or municipal office may close on any day designated in this section as a holiday, and upon such bank, building and loan association, credit union or public office being closed on such day, any act authorized, required or permitted to be performed at or by such bank, building and loan association, credit union, public office, or public official may be performed on the next succeeding business day and no liability or loss of rights of any kind shall result from such delay." (Laws 1947, p. 235, Section 2; Laws 1959, p. 115, Section 2)

STATEMENT OF THE CASE

Petitioner, TULSA THEATRICAL STAGE EMPLOYEES UNION, LOCAL 354, instituted this action in the District Court of Tulsa County, State of Oklahoma, on the 27th day of October, 1972, to recover from the Respondent, BROADWAY THEATRE LEAGUE OF TULSA, INC., certain wages earned by Petitioner's members by reason of services performed by them, for the Respondent, on the 22nd day of February, 1972, on the occasion of George Washington's Birthday.

For a number of years, Petitioner's union members have performed certain services for Respondent pursuant to an agreement

incorporating a schedule of pay rates and designating pertinent holidays, adopted and confirmed in writing, on or about the 1st day of January, 1969, Plaintiff's Exhibit 1, a copy of which same is printed in Appendix B hereto, infra, page 40, which same evidenced the contract existing between the parties for the period from the 1st day of January, 1969, to the 1st day of September, 1972. Specifically the contract provided for a schedule of pay rates to be paid by the Respondent for services performed for it by the Petitioner's union members, and also designated certain holiday days for which Petitioner's union members were entitled to receive as pay, double time, or twice the standard rate of pay.

One of the designated holiday days for which Petitioner's union members were entitled to receive twice the standard rate of pay for work performed on said days was George Washington's Birthday, which was observed in the State of Oklahoma, the place where the contract was entered into, on the 22nd day of February each year, pursuant to statute, specifically, Section 82.2 of Title 25 of the Statutes of the State of Oklahoma, Laws 1959, at the time the contract was entered into by the parties.

Petitioner's union members performed services for the Respondent on the 22nd day of February, 1972, during the term of said

contract, said date being George Washington's Birthday under the terms of said contract, and, pursuant to said contract, demanded the sum of $2,382.60, the sum "stipulated by the parties" as the sum due and payable for services rendered if the union members recovered twice the standard rate as provided for as payment for work on designated holidays in the contract. Respondent tendered the sum of $1,494.00 to Petitioner, which Petitioner refused, as payment in full for all work performed for Respondent by Petitioner's union members on the 22nd day and 23rd day of February, 1972, payable at the standard rate as provided for in the contract adopted by the parties.

Respondent refused to pay the double time rate as provided for in the contract for the services Petitioner's union members performed on the 22nd day of February, 1972, alleging that Section 6103 of Title 5 of the United States Code, as amended June 28, 1968, changed the date for the observance of George Washington's Birthday, under the contract, from the 22nd day of February to the third Monday in February, and that the third Monday in February, which in 1972 fell on the 21st day of February, automatically became the day, under the contract to be celebrated as George Washington's Birthday, and the day on which double time wages were to be paid.

Petitioner's union members performed no work for the

Respondent on the third Monday in February, 1972.

Respondent alleged that by reason of the fact that the Oklahoma Legislature, in 1971, amended the Oklahoma holiday statute, Section 82.2 of Title 5 of the Statutes of the State of Oklahoma, Laws 1959, which was in effect at the time the parties entered into the contract, in 1969, and changed the date for the observance of George Washington's Birthday under the contract, from the 22nd day of February to the third Monday in February, that the new date as provided by the amended statute automatically became the date to be observed as George Washington's Birthday, under the contract setting forth the schedule of pay rates adopted by the parties.

On trial of this cause, before the District Court of Tulsa County, State of Oklahoma, the Respondent specifically requested the trial Court to take judicial notice of the pertinent federal statutes and pertinent statutes of the State of Oklahoma relevant to the issues presented to the trial Court, see page 20, lines 8-15, page 31, lines 1-3, and page 43, lines 21-23, of the trial transcript printed in Appendix C hereto, infra, page 41.

Petitioner initially raised the issue of the violation of its constitutional right to be forever free from legislative impairment of obligation of contract, as prohibited by Section 10, Clause 1, of Article

I of the Constitution of the United States, in the proceeding in the District Court of Tulsa County, State of Oklahoma, in its memorandum brief in support of its motion for summary judgment, filed on the 11th day of December, 1974, and again raised the question in oral argument to the trial Court on the 11th day of December, 1974, see page 4, lines 18-25 and page 5, lines 1-5 of the trial transcript printed in Appendix C hereto, infra, page 42. The trial Court overruled Petitioner's motion for summary judgment, with an exception to the trial Court's ruling granted to the Petitioner, see page 11, lines 11-23 of the trial transcript printed in Appendix C hereto, infra, page 42.

Petitioner, on trial of this cause, again presented argument to the trial Court raising the question of the violation of Petitioner's constitutional right against impairment of obligation of contract, prohibited by Section 10, Clause 1, of Article I of the Constitution of the United States, see page 32, lines 2-9 of the trial transcript printed in Appendix C hereto, infra, page 43. The trial Court, in its decition, specifically applied Section 82.1 of Title 25 of the Statutes of the State of Oklahoma, Laws 1971, notwithstanding the fact that the 1971 amendment was enacted after the contract was made, all in violation of Petetioner's constitutional right to be protected from impairment of

obligation of contract.

Petitioner, in its motion for new trial, filed in the District Court of Tulsa County, State of Oklahoma, on the 12th day of December, 1974, and orally argued to the trial Court on the 28th day of January, 1975, again raised the issue of the violation of Petitioner's constitutional right to be free from unconstitutional impairment of obligation of contract, prohibited by Section 10, Clause 1, of Article I of the Constitution of the United States, see page 42, line 25 and page 43, lines 1-9 of the trial transcript printed in Appendix C hereto, infra, page 43. The trial Court overrulled Petitioner's motion for new trial and Petitioner appealed.

Petitioner, by petition in error, filed in the Supreme Court of the State of Oklahoma, on the 18th day of February, 1975, specifically alleged in paragraph 7 of the said petition, as follows:

> "The Plaintiff Appellant (Petitioner) further alleges that the trial Court committed error, excepted to by the Plaintiff, in that the the trial Court's error at law at the trial violated Plaintiff's federal and state constitutional rights by the impairment of its contractural rights,, all in contravention of Article I of the Constitution of the United States of America, and in contravention of the prohibition against the impairment of contractual rights contained in the Constitution of the State of Oklahoma."

The initial opinion of the Court of Appeals of the State of Oklahoma, Division 1, rendered and entered on the 23rd day of December, 1975,

printed in Appendix A hereto, infra, page 34, overlooked the issue of impairment of obligation of contract. The opinion of the Court of Appeals of the State of Oklahoma, Division 1, rendered and entered on the 24th day of February, 1976, after oral argument to the Court, printed in Appendix A hereto, infra page 30, reversed the trial Court and its own first opinion, and by order entered on the 30th day of March, 1976, printed in Appendix A hereto, infra page 29, reaffirmed the decision in favor of Petitioner.

The Supreme Court of the State of Oklahoma by decision rendered and entered on the 18th day of May, 1976, printed in Appendix A hereto, infra page 23, ignored Petitioner's contentions that Petitioner's constitutional right against unconstitutional impairment of obligation of contract, prohibited by Section 10, Clause 1, of Article I of the Constitution of the United States, was violated by the decision of the trial Court.

Petitioner, from the beginning, and from the instance of the filing of its motion for summary judgment, on the 11th day of December, 1974, prior to trial, through each stage of the appellate procedure through the Court of Appeals of the State of Oklahoma, Division 1, and through the Supreme Court of the State of Oklahoma, has continuously and adamantly urged each Court to consider determinative in making its decision of this matter, the violation of Petitioner's

constitutional right to protection from unconstitutional impairment of obligation of contract as prohibited by Section 10, Clause 1, of Article I of the Constitution of the United States.

REASONS FOR GRANTING WRIT

This is a labor contract. And if by reason of this precedent, it should become fashionable,or even occasionally permissable for the Legislature, or the Courts, by the application of laws enacted after contracts are made and solemnified, to except labor contracts from the protection of the guarantee against unconstitutional impairment of obligation of contract, no good purpose can be served, and commerce, industry and even government shall certainly undergo profound changes unforeseeable at this point in time.

The outstanding opinion appealed from would reform an existing contract by construing the contract as being subject to legislation enacted two years subsequent to the execution of the contract.

Additionally, the opinion complained of requires the Court to ignore controlling legislation existing at the time the contract was made, which would heretofore be held to be part and parcel of the contract.

This question is of importance to the entire legal community in that the outstanding opinion most certainly will open the door wide for

a chaotic conglomeration of prayers for the reformation of contracts based solely upon anticipatory development of the effect of subsequent or future legislation upon contractual relations, before or after the fact, by every irresponsible party to a contract, where such subsequent alteration of performance or obligation would innure to the advantage of the applicant.

Such a circumstance if left uncorrected, even in one state, must certainly unsettle and disturb the construction of contracts of every kind and nature, and such construction of the applicability of ''after enacted'' statutes to previously executed contracts in open violation of constitutional curbs upon the derogation or impairment of the obligation of contract strikes directly at the heart of our system.

This case concerns the rights of private entities to enter into contracts and to be bound by the terms of their contracts, as they exist, at the time the contract is entered into. The adoption of a federal statute, and the subsequent amendment of an Oklahoma statute, in 1971, have both been construed to alter the date for the observance of a holiday day, initially fixed by the contract and the statute in effect when the contract was made, by changing the date from February 22nd of each year to the third Monday in February of each year, pursuant to statute enacted subsequent to the date the contract was entered into

and during the period of time when the contract was in effect.

Petitioner has consistently urged the Court to consider any amendment of the contract between the parties, by statutes subsequently enacted, or subsequently enacted and construed, as a violation of Petitioner's constitutional right to freedom from impairment of obligation of contract as prohibited by Section 10, Clause 1, of Article I of the Constitution of the United States.

A fundamental rule of contractual construction applied to all contracts is that existing statutes at the time the contract is made become a part of the contract and must be read into it. *Walker v. Whitehead,* 83 U.S. 314, 16 Wall. 314, 21 L.Ed. 357; *The Cleveland, Painsville, and Ashtabula Railroad Co. v. Pennsylvania,* 82 U.S. 300, 15 Wall. 300, 21 L.Ed 179. The specific day intended by the parties to be observed as George Washington's Birthday is designated in the contract, although it is necessary to refer to the relevant, existing statutes in effect at the time the contract was executed to determine the date intended to be observed as George Washington's Birthday.

The contract in question was executed in January, 1969, and was to remain in effect, by its terms, from that date until the 1st day of September, 1972. At the time the contract was executed, in January, 1969, the statutes of the State of Oklahoma specifically designated the

date for the observance of holidays in the State of Oklahoma. The specific holiday day in question, George Washington's Birthday, was designated to be celebrated, under the terms of the statute, Section 82.2 of Title 25 of the Statutes of the State of Oklahoma, Laws 1959, on the 22nd day of February. In connection with the aforementioned statute, also by statute in the State of Oklahoma, Section 162 of Title 15 of the Statutes of the State of Oklahoma, Laws 1910, the statutes in force when the contract is made become a part of the contract as fully as if the provisions of the statutes had been incorporated into the contract. The uncontroverted evidence at trial also clearly established that the day Petitioner intended to observe as George Washington's Birthday under the terms and provisions of the contract was the 22nd day of February, see trial transcript page 17, line 25, and page 18, lines 1-6, Appendix C hereto, infra page 43. It is therefore seen that on the 1st day of January, 1969, at the time the contract was executed, the only date that could have possibly been contemplated by the parties for the observance of George Washington's Birthday was the 22nd day of February.

New statutes and amendments to existing statutes are construed to operate prospectively only, unless on the face of the instrument or enactment, the contrary intention is manifest beyond a reasonable

doubt. *City of Shreveport v. Cole,* 129 U.S. 43, 32 L.Ed 589, 9 S. Ct. 210. The amendment to Oklahoma's holiday statute, Section 82.1 of Title 25 of the Statutes of the State of Oklahoma, Laws 1971, effective April 2, 1971, and relied on by the Supreme Court of the State of Oklahoma, in its opinion rendered and entered on the 18th day of May, 1976, contains no reference or intimation that this newly enacted statute is to apply retroactively. The present statute, as amended, designating the date for the observance of George Washington's Birthday in the State of Oklahoma has absolutely no effect upon the contract, in determining what date was intended by the parties to be observed as George Washington's Birthday, for the term of the contract at the time the parties entered into the contract.

More importantly, the Supreme Court of the State of Oklahoma's application of the 1971 Oklahoma holiday statute, violates Petitioner's federal and Oklahoma constitutional rights by impairment of obligation of contract. This Court has held from the very foundation of our Union, in interpreting violations of constitutional rights by impairment of obligation of contract, that any deviation from the terms of a contract by postponing or accelerating the period of performance prescribed, imposing conditions not expressed, or dispensing with performance of those which are, however minute, or apparently

immaterial, in their effect upon the contract of the parties, impairs its obligation. *Green v. Biddle,* 21 U.S. 1, 8 Wheat 1, 5 L. Ed 547; *West River Bridge v. Dix,* 47 U.S. 507, 6 How, 507, 12 L. Ed 535.

In *Sturges v. Crowningshield,* 17 U.S. 122, 4 Wheat. 122, 4 L. Ed 529, an early case before the United States Supreme Court, Chief Justice Marshall determined what constitutes the obligation of a contract and what will impair it, stating:

> "It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is the obligation. Any law which releases a part of his obligation, must, in the literal sense of the work, impair it." (See *Sturges,* supra, U.S. at 197, Wheat at 197, l.Ed at 549.)

The amount of the impairment of the obligation is immaterial. *Farrington v. Tennessee,* 95 U.S. 679, 24 L. Ed 558.

In the case at bar, Respondent has given its promise to pay the Petitioner's members double time wages on George Washington's Birthday, which was fixed by the existing statute at the time, as February 22nd. The contract binds the Respondent to pay that double time rate for all work performed on February 22nd during the life of the contract and this is the obligation of the contract.

Any law which releases the Respondent from the obligation to pay double time wages on any February 22nd during the life of the contract, must, in the literal sense of the word, release a part of the obligation, and must, in the literal sense of the word, impair it. See *Sturges v. Crowningshield,* supra.

It is obvious from the opinion of the Supreme Court of the State of Oklahoma, page 2 of said opinion, at paragraph 3, which states:

> "However, effective 1971, both Congress of the United States (5 U.S.C., Sec. 6103) and Oklahoma Legislature (25 O.S. 1971, Sec. 82.1) designated the third Monday in February as date for observing George Washington's Birthday as a holiday. In 1972, this Monday fell on February 21. February 22 was not designated as a holiday. Union performed services on February 22, 1972, but not February 21, 1972,"

that the Supreme Court of the State of Oklahoma, in its decision, applied an Oklahoma statute, enacted after the contract was made, to the contract to fix and determine the date for the observance of George Washington's Birthday, in 1972. The terms of the contract and the consideration, the rate of pay for Petitioner's members, have been impaired to the detriment of Petitioner, by the application to the contract of an amended Oklahoma holiday statute, enacted subsequent to the date that the parties initiated the contract. The statute complained of, changed the date for the observance of George Washington's Birthday under the contract from the 22nd day of

February, the date fixed by the contract and existing statutes at the time, to the third Monday in February, as fixed by the Oklahoma statute enacted two years later in 1971. Thereby, Petitioner's members have been deprived of double time wages which become due and payable upon completion of work performed on the 22nd day of February, 1972, under the terms of the contract initiated in January, 1969.

By applying the statute adopted after the contract was made, Petitioner's contract has been impaired to the detriment of Petitioner in violation of Section 10, Clause 1, of Article I of the Constitution of the United States, and in violation of Section 15, of Article II of the Constitution of the State of Oklahoma.

We urge this Honorable Court to enforce the contract according to the provisions of the law which were in existence at the time the contract was initiated.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Oklahoma in Tulsa Theatrical Stage Employees Union, Local 354 v. Broadway Theatre League of Tulsa, Inc. In the event that the Petition is granted, Petitioner prays that the judgment of the Court

below be reversed, and that the cause be remanded to the trial Court with directions to enter judgment for Petitioner as prayed for in its petition.

Respectfully submitted,

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APPENDIX A

OPINION BELOW

Opinion of Supreme Court of the State of Oklahoma, of May 18, 1976

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

TULSA THEATRICAL STAGE EMPLOYEES UNION, LOCAL 354
Appellant,

vs

BROADWAY THEATRE LEAGUE OF TULSA, INC.,
Appellee.

No. 48,208

CERTIORARI TO THE COURT OF APPEALS, DIVISION 1

Appellant filed suit to recover double wages in accordance with contract for allegedly working on a holiday. District Court of Tulsa County, Hon. Richard V. Armstrong, Trial Judge, entered judgment for appellee. Court of Appeals, Division 1 affirmed trial court. On rehearing Court of Appeals, Division 1 reversed trial court. Appellee seeks certiorari.

CERTIORARI GRANTED

OPINION OF COURT OF APPEALS VACATED,

JUDGMENT OF TRIAL COURT AFFIRMED

Lloyd G. Larkin,
Tulsa, Oklahoma,
For Appellant.

Ungerman, Grabel & Ungerman,
Tulsa, Oklahoma,
For Appellee.

BERRY, J.:

Action was instituted by Tulsa Theatrical Stage Employees Union, Local 354 (Union) against Broadway Theatre League of Tulsa, Inc. (Theatre) to recover sum of $2,382.60, which amounted to double pay for services performed on February 22, 1972, George Washington's birthday.

After trial of case to court judgment was entered denying Union double pay, but instead granted Union regular pay of $1,494.00, the amount Theatre had tendered for services performed on February 22, 1972, and part of February 23, 1972.

On appeal, Court of Appeals, Division 1 affirmed trial court. Court of Appeals, Division 1 subsequently granted rehearing, vacated prior opinion, and reversed decision of trial court. Theatre seeks certiorari.

The record reveals parties adopted a schedule of pay rates effective January 1, 1969, which provided:

> "Holiday Days shall be paid at twice the prevailing rate. The following are holiday's effected:
>
> 1. New Years Day
> 2. George Washingtons Birthday
> 3. Good Friday
> 4. Easter Sunday
> 5. Memorial Day
> 6. Fourth of July
> 7. Labor Day
> 8. Veterans Day
> 9. Thanksgiving
> 10. Christmas Eve
> 11. Christmas Day
> 12. New Years Eve"

Union contends it is entitled to double pay for performing services on February 22, 1972, because it was George Washington's birthday both historically[1] and by statute. The statute relied upon is 25 O.S. 1959 § 82.2, which was in effect when the schedule of pay rates was adopted in 1969,

However, effective 1971, both Congress of the United States (5 U.S.C. § 6103) and Oklahoma Legislature (25 O.S. 1971 § 82.1) designated third Monday in February as date for observing George Washington's birthday as a holiday. In 1972, this Monday fell on February 21. February 22 was not designated as a holiday. Union performed services on February 22, 1972, but not February 21, 1972.

The single issue before this Court is, therefore, to determine what intent of parties was at time agreement was entered into. See Withington v. Gypsy Oil Co., 68 Okl. 138, 172 P. 634, wherein it is

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1. Actually George Washington was born on February 11, 1731. When the Gregorian calendar replaced the julian calendar by act of British Parliament in 1750, his birthday was changed to February 22. Facts About The Presidents, 2nd ed., by Joseph Nathan Kane. Yet, according to Douglas' *American Book of Days*, Washington's birthday was first celebrated on February 12 at the direction of Compte de Rochambeau, commander of the French forces during the American Revolution.

stated in paragraph 5 of syllabus:

> "The court must place itself, as far as possible, in the position of the parties when the contract was entered into; and consider the instrument itself as drawn, its purpose and the circumstances surrounding the transaction, and, from a consideration of all these elements, determine upon what sense or meaning of the terms used their minds actually met."

To ascertain intent of parties to a contract the court must place itself in the position of the parties when the contract was made, and and look at the contract prospectively, rather than in retrospect. Pepsi-Cola Bottling Co. of Tulsa, Okla. v. Peerson, Okl., 471 P. 2d 924.

In instant action, parties stipulated agreement was prepared by Union. At time agreement was entered into federal legislation establishing holiday to be celebrated as George Washington's birthday had previously been enacted but it was not to become effective until January 1, 1971. The reason for delay between bill's enactment and its effective date is reported in Senate Report No. 1293 in 1968 U.S. Code Congressional and Administrative News 2335:

> "* * * In this regard, it is significant to note that the bill does not go into effect until January 1, 1971. This advance effective date would afford state legislatures an opportunity to act. In addition it will permit ample time for labor-management contracts to take the new holidays into account * * *"

Both Union and Theatre are deemed to have had knowledge of the federal legislation changing George Washington's birthday holiday to third Monday in February. It is also reasonable to infer parties anticipated state legislation would follow. Omission of specific dates in agreement would have been logical manner of handling this problem.

> Black's Law Dictionary, 4th ed., defines holiday as:
> "a day set apart for commemorating some important event in history; a day of exemption from labor * * *"
> Bouvier's Law Dictionary, 3rd ed., defines the term as:
> "Legal holidays are * * * merely the creation of statute law * * *"

Holidays are days that vast majority of working force are free from work responsibilities, and it is generally considered an imposition to have to work on one of these days. It is therefore unreasonable to conclude parties intended double pay on days not designated at time work was performed as legal holiday.

In Mortgage Clearing Corp. v. Baughman Lumber Co., Okl., 435 P.2d 135, we stated as follows:

> "A reasonable construction of a contract is preferred to one which is unreasonable, and where the language of the contract is contradictory, obscure, or ambiguous and susceptible of two constructions, it will be interpreted in a fair and rational sense, rather than in a manner which would make the contract unusual, inequitable, or such that reasonable men would be unlikely to enter into."

Since agreement was drafted by Union any ambiguity will be

resolved against it. See King-Stevenson Gas & Oil Co. v. Texam Oil Corp., Okl., 466 P.2d 950.

We conclude Union is not entitled to double pay for services performed on February 22, 1972.

Certiorari granted. Opinion of Court of Appeals, Division 1, is hereby vacated and trial court affirmed.

ALL JUSTICES CONCUR.

Order of Court of Appeals of the State of Oklahoma, Division 1, of March 30, 1976

IN THE COURT OF APPEALS OF THE STATE OF OKLAHOMA
(Division No. 1)

TULSA THEATRICAL STAGE EMPLOYEES UNION, LOCAL 354

Appellant,

vs.

BROADWAY THEATRE LEAGUE OF TULSA, INC.,

Appellee

No. 48,208

ORDER

The opinion adopted herein on February 24, 1976, is hereby amended as follows:

By striking the words "On a motion for summary judgment" appearing in line 5 of the first paragraph, and substituting in lieu thereof the words, "After a non-jury trial."

The opinion as so amended, is hereby re-adopted.

The Appellee's Petition for Rehearing is hereby considered as being refiled with respect to said opinion as amended, and is hereby denied.

DONE IN CONFERENCE This 30th day of March, 1976.

LESTER A. REYNOLDS, Presiding Judge

Opinion of Court of Appeals of the State of Oklahoma, Division 1, of February 24, 1976

IN THE COURT OF APPEALS OF THE STATE OF OKLAHOMA
(Division No. 1)
TULSA THEATRICAL STAGE EMPLOYEES UNION, LOCAL 354,
Appellant,

vs.

BROADWAY THEATRE LEAGUE OF TULSA, INC.,
Appellee.

No. 48,208

ORDER

Motion for rehearing granted. Opinion of December 23, 1975 is hereby withdrawn and superseded by opinion of February 24, 1976.

DONE IN CONFERENCE This 24th day of February, 1976.

LESTER A. REYNOLDS, Presiding Judge

IN THE COURT OF APPEALS OF THE STATE OF OKLAHOMA
(Division No. 1)

TULSA THEATRICAL STAGE EMPLOYEES UNION, LOCAL 354,
Appellant,

vs.

BROADWAY THEATRE LEAGUE OF TULSA, INC..
Appellee.

No. 48, 208

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA
HONORABLE RICHARD V. ARMSTRONG, JUDGE

REVERSED WITH DIRECTIONS

Lloyd G. Larkin
Tulsa, Oklahoma,
For Appellant.

Ungerman, Grabel & Ungerman
Tulsa, Oklahoma,
For Appellee.

ROMANG, J.:

Tulsa Theatrical Stage Employees Union, Local 354 commenced this action against Broadway Theatre League of Tulsa, Inc. to recover the sum of $2,382.60, which amounted to twice the standard rate of pay provided for regular working hours, for services performed on February 22, 1972. On a motion for summary judgment, the trial court refused to grant double pay but granted the members of the Union only $1,494.00, the amount which Broadway Theatre League had tendered. The trial court assessed costs against the Union and refused to permit the recovery of attorney's fees against the Theatre League. The Union has appealed.

The "Schedule of Pay Rates" upon which the Union sued

provided that effective January 1st, 1969, as follows:

> "Holiday Days shall be paid at twice the prevailing rate. The following are holiday's effected:
>
> 1. New Years Day
> 2. George Washingtons Birthday
> 3. Good Friday
> 4. Easter Sunday
> 5. Memorial Day
> 6. Fourth of July
> 7. Labor Day
> 8. Veterans Day
> 9. Thanksgiving
> 10. Christmas Eve
> 11. Christmas Day
> 12. New Years Eve"

Thus it can be seen that the holiday pay rate was not confined to statutory legal holiday periods.

Although the Congress of the United States (5 U.S.C.A. 6103) and the Oklahoma Legislature (25 O.S. 1971, § 82.1) have designated the third Monday in February as the date for observing George Washington's birthday as a holiday, it is an historical fact that George Washington's birthday is February 22nd, according to the Gregorian calendar.

When the "Schedule of Pay Rates" was adopted in 1969, George Washington's birthday in Oklahoma was February 22nd, not only historically but also by statute. Therefore no other date was thought of or intended.

Since that same "Schedule" is the one on which this suit is founded, the plaintiff Union is entitled to the holiday rate for work done on February 22, 1972.

The judgment of the trial court is hereby reversed with direction to enter judgment for the plaintiff in accordance with our views herein expressed, plus a reasonable attorney fee.

REVERSED WITH DIRECTIONS.

REYNOLDS, P.J. and BOX, J. concur.

Opinion of Court of Appeals of the State of Oklahoma, Division 1, of December 23, 1975

IN THE COURT OF APPEALS OF THE STATE OF OKLAHOMA
(Division No. 1)

TULSA THEATRICAL STAGE EMPLOYEES UNION, LOCAL 354,

Appellant,

vs.

BROADWAY THEATRE LEAGUE OF TULSA, INC.,

Appellee

No. 48,208

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA
HONORABLE RICHARD V. ARMSTRONG, JUDGE

AFFIRMED

Lloyd G. Larkin
Tulsa, Oklahoma,

For Appellant,

Ungerman, Grabel & Ungerman
Tulsa, Oklahoma,

For Appellee.

ROMANG, P. J.:

Tulsa Theatrical Stage Employees Union, Local 354 commenced this action against Broadway Theatre League of Tulsa, Inc. to recover

the sum of $2,382.60, which amounted to twice the standard rate of pay provided for regular working hours, for services performed on February 22, 1972. On a motion for summary judgment, the trial court refused to grant double pay but granted the members of the Union only $1,494.00, the amount which Broadway Theatre League had tendered. The trial court assessed costs against the Union and refused to permit the recovery of attorney's fees against the Theatre League. The Union has appealed.

The contract upon which the Union sued provided that effective January 1st, 1969 union members were to be paid at the hourly rate of $4.25 per hour, and twice that for "Holiday Days." Twelve specific holidays were named, including George Washington's Birthday. The dates of the holidays were not mentioned.

Black's Law Dictionary defines a holiday as "a day set apart for commemorating some important event in history." Bouvier's Law Dictionary (Third Revision) includes the following in its definition of the term:

> "Legal holidays are, . . . merely the creation of statute law . . . Legal holidays as distinguished from the first day of the week are those days which are set apart by statute or by executive authority for fasting and prayer, or those given over to religious observance and amusements, or for political, moral or social duties or anniversaries or merely for popular recreation and amusement

under such penalties and prohibitions alone as are expressed in positive legislative enactments."

Both the Congress of the United States (5 U.S.C.A. 6103) and the Oklahoma Legislature (25 O.S. 1971, § 82.1) have designated the third Monday in February as the date of the George Washington's Birthday holiday. In 1972, this Monday fell on February 21st. February 22nd was not designated as a holiday.

It follows logically, therefore, that the membership of the Union was not entitled to double pay for work on February 22, 1972, and the judgment of the trial court was correct.

AFFIRMED.

REYNOLDS, J. and BOX, J. concur.

Journal Entry of Judgment of the District Court of Tulsa Country, State of Oklahoma, of December 11, 1974

IN THE DISTRICT COURT WITHIN AND FOR
TULSA COUNTY STATE OF OKLAHOMA

TULSA THEATRICAL STAGE EMPLOYEES UNION,
LOCAL 354,

Plaintiff,

vs

BROADWAY THEATRE LEAGUE

Defendant.

JOURNAL ENTRY OF JUDGMENT

This cause coming on to be heard this 11th day of December, 1974, pursuant to regular assignment for trial, Plaintiff being represented by its attorney, Lloyd G. Larkin, and Defendant being represented by its attorney, Maynard I. Ungerman, and the Court having heard the oral arguments of counsel and the testimony of witnesses sworn and examined in open court, and having reviewed the exhibit admitted into evidence and having taken judicial notice of the applicable Federal and Oklahoma Statutes pertinent to this cause, and being fully advised in the premises makes certain findings of fact, which findings of fact are contained in the transcript of the proceedings of the Court and are incorporated herein by reference.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by

the Court that the said Plaintiff, be, and the same is hereby, entitled to judgment against the said Defendant, Broadway Theatre League of Tulsa, Inc in the sum and amount of One Thousand Four Hundred Ninety Four and no/100 Dollars ($1,494.00) with interest from this date at the rate of 10 percent (10%) per annum in accordance with the Statutes of the State of Oklahoma, and that the costs of this action are assessed against Plaintiff, Tulsa Theatrical Stage Employees Union, Local 354.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff, be, and the same is hereby denied attorney's fees by reason of the fact that Defendant had tendered to Plaintiff the sum and amount of One Thousand Four Hundred Ninety Four and no/100 Dollars ($1,494.00) as payment in full of all sums due and owing to the employees of said Plaintiff on February 22, 1972, which Plaintiff refused.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff, be, and the same is hereby allowed an exception to the Court's ruling and the Court does hereby acknowledge Plaintiff's notice of intent to appeal the Court's decision.

RICHARD V. ARMSTRONG
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

Lloyd G. Larkin, Attorney for Plaintiff

Maynard I. Ungerman, Attorney for Defendant

Order of Supreme Court of the State of Oklahoma, of June 21, 1976

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Monday, June 21, 1976

THE CLERK IS DIRECTED TO ISSUE
THE FOLLOWING ORDERS:

48,208 Tulsa Theatrical Stage Employees Union, Local 354 v. Broadway Theatre League of Tulsa, Inc. Rehearing denied.

BEN T. WILLIAMS
CHIEF JUSTICE

APPENDIX B

EXHIBITS

Plaintiff's Exhibit 1, written schedule of pay rates and holiday days

NEW SCHEDULE OF PAY RATES
EFFECTIVE JAN. 1, 1969 — I.A.T.S.E. Local #354

PERFORMANCE RATE 4 Hrs — $18.00

HOURLY RATE $4.25 per Hr.

Overtime shall be paid at twice the prevailing hourly rate. All time from 12 midnite till 8 A.M. shall be paid as overtime. Holiday Days shall be paid at twice the prevailing rate.

The following are holiday's effected:

1. New Years Day
2. George Washingtons Birthday
3. Good Friday
4. Easter Sunday
5. Memorial Day
6. Fourth of July
7. Labor Day
8. Veterans Day
9. Thanksgiving
10. Christmas Eve
11. Christmas Day
12. New Years Eve

All trucks, buses, or railroad shows shall be required car loaders and unloaders for each unit that equipment is unloaded from.

A rate increase of $1.00 per performance and 25c per hour shall be effective on the following dates. Sept. 1, 1969, Sept. 1, 1970, Sept. 1, 1971, and Sept. 1, 1972.

I.A.T.S.E. LOCAL #354

APPENDIX C

REFERENCES TO FEDERAL QUESTION AND TESTIMONY AT TRIAL

Respondent's request for trial Court to take judicial notice of pertinent Federal and State Statutes (trial transcript, page 20, lines 8-15, page 31, lines 1-3, page 43, lines 21-23)

MR. UNGERMAN: Comes now the defendant, demurs to the evidence on the grounds and for the reasons that it fails to establish a cause of action in this case as against this defendant. We would ask the Court in this regard to take judicial notice of both the federal and the state's statutes that as of the date in question, provide that George Washington's birthday is the third Monday in February, which would be February the 21st. (page 20 lines 8-15)

MR. UNGERMAN: Will the Court take judicial notice of the federal and state statutes?
THE COURT: The Court will. (page 31, lines 1-3)

MR. UNGERMAN: Let the defendant advise the Court that the Court did take judicial notice of the federal and state statutes applicable hereto. (page 43, lines 21-23)

Petitioner raising issue of violation of Constitutional rights in argument, to trial Court, on motion for summary judgment (trial transcript, page 4, lines 18-25, page 5, lines 1-5)

Now, with respect to the law, the Court should note that even if the amendment were to be considered that it was to take effect only on January 1st, 1971, and if that's the case, then the Court would be, of course, compelled to look at the Constitution of the United States, including the inhibition against any statute in derogation of contract previously existing, and therfore it has to follow like the night to the day that if we entered in to a contract where George Washington's Birthday was February the 22nd in 1969, that no act of Congress could change that contract, only an act of the parties themselves, not withstanding the fact that Congress might change the date for the celebration in 1971, in the absence of any agreement of the parties.

Trial Court overrulling Petitioner's motion for summary judgment, with exception allowed to Petitioner (trial transcript, page 11, lines 11-23)

THE COURT: The Court will permit the plaintiff to file its motion for summary judgment instanter with the Court.
The Court does knowledge receipt of the same and will direct that the same be filed with the clerk of the District Court of Tulsa County, Oklahoma, subsequent to this proceeding. In addition thereto, the Court knowledges receipt of a memorandum brief in support of the motion for summary judgment. The Court, upon statements of counsel, and being advised in the premises, and from a review of the pleadings, concludes that plantiff's motion for summary judgment should be and the same is hereby overruled with exception.

Petitioner raising issue of violation of Constitutional rights in argument to trial Court, at trial (trial transcript, page 32, lines 2-9)

And the fact that the federal government decided, after the fact again, to amend their statutes and celebrate another day, I'll submit to the Court that it's elementary law that man or government can impair the right of contract in the United States of America except for a couple of reasons directly related to the police power or the health and welfare of the citizens, and that issue isn't before this Court.

Petitioner raising issue of violation of Constitutional rights in argument to trial Court, on motion for new trial (trial transcript, page 42, line 25, page 43, lines 1-9)

The plaintiff would further show the Court that the words George Washington's birthday at the time and under the circumstances when the Exhibit was first transmitted to the defendant, was February the 22nd, and that it would be a violation of the constitutional rights of the plaintiff and the defendant, and an impairment of the obligation of the contract if the Court were to permit either the state or the federal government, by statute or otherwise, to change the contract as originally agreed upon by the parties.

Testimony of Petitioner's business manager, at trial, concerning Petitioner's intention as to the day intended to be observed as George Washington's Birthday under the contract (trial transcript, page 17, line 25, page 18, lines 1-6)

Q. What did you observe as George Washington's Birthday, directing your attention to the fact the Exhibit does not set forth a given date.

A. Well, at the time this was drawn up, we weren't observing any national holidays. And we observed George Washington's birthday on February 22nd, 21st, whichever the day — 22nd, I believe it was.